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BEFORE THE

Federal Communications Commission RECEIVED

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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
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	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, hereby submits comments in response to the Notice of Proposed Rulemaking ("Notice"), released in the above-captioned proceeding on March 2, 1993.[1]

I. INTEREST OF PRIMESTAR

PRIMESTAR distributes multiple channels of video programming through a Ku-band fixed communications satellite that transmits directly to homes properly equipped to receive the satellite signals. As the Commission states in Paragraph 11 of the Notice,

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[1] 8 FCC Rcd 1589 (1993).

PRIMESTAR currently uses eleven Ku-band fixed satellite transponders to distribute seven superstations, three pay-per-view channels and a Japanese language channel.[2] PRIMESTAR intends to begin using video compression equipment by early next year and will be able to increase its satellite channel capacity. At that time, PRIMESTAR will be able to distribute many more video programming services.

PRIMESTAR is a limited partnership comprised of subsidiaries of nine cable television companies, which are identified in footnote 12 of the Notice, and of GE American Communications, Inc. ("GE Americom"). GE Americom is licensed under Part 25 of the Commission's Rules to operate the Ku-band fixed service satellite on which PRIMESTAR leases transponders for its direct to home ("DTH") service.

II. SUMMARY OF COMMENTS

The Commission appears to recognize that Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") includes several provisions which could affect adversely the success of the developing direct broadcast satellite ("DBS") industry. PRIMESTAR acknowledges that the 1992 Cable Act

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2 The Commission's description of PRIMESTAR's operations in paragraph 11 of the Notice is somewhat incorrect. First, PRIMESTAR does not lease reception equipment to subscribers. Reception equipment is rented to subscribers by PRIMESTAR's third party distributors. The distributors purchase the reception equipment from PRIMESTAR's equipment vendor. The distributors act as PRIMESTAR's agents for pay-per-view sales only. Otherwise, they are programming retailers that procure programming at wholesale from PRIMESTAR.

imposes public interest obligations on DBS providers, and PRIMESTAR accepts those obligations that the statute imposes on it. PRIMESTAR endorses the Commission's efforts to interpret the statute to minimize harmful effects on the industry and, ultimately, the diversity of television viewing. In light of this expressed Commission policy, PRIMESTAR submits that some of the tentative conclusions reached by the Commission should be modified. In these comments, PRIMESTAR will suggest what it considers to be some constructive approaches to implement the

extent the lessees use Ku-band transponders for direct-to-home service. In PRIMESTAR's view, the satellite licensees and DBS program suppliers that lease multiple transponders for DBS purposes, will agree as part of their lease negotiations on the appropriate division of the noncommercial programming obligations of subsection (b). Once the channel lessee has assumed the noncommercial programming obligations via contract, the Commission should look to that lessee to fulfill the obligations assumed.

Under subsection (a), the definition of "provider" is not so restricted, and the Commission can reasonably decide that the DBS programmer should assume responsibility for carrying out the duties now shouldered by broadcasters and cable operators concerning political advertising.

PRIMESTAR generally agrees with the Commission's proposals for rules covering the substance of the "public interest" requirements of the statute. It also agrees with the Commission's suggestion for "grandfathering" existing channel capacity used for DBS programming and imposing the noncommercial program carriage obligations on these DBS systems only as they are enlarged.

For new and enlarged systems, PRIMESTAR recommends applying, at least for systems having fewer than 100 channels, the lowest channel capacity percentage of the four to seven percent range mandated by the statute for noncommercial programming. The Commission should not require use of other than discrete channels for this purpose, and neither the satellite licensee nor the DBS programmer should be held liable for the content of any programming on the channels.

Channel-leasing rates for the suppliers of the noncommercial programming -- which rates under Section 335(b)(4) can be no more than 50 percent of direct costs -- should be based on "direct costs" as defined by the Commission to include the range of capital and operational costs not excluded by the statute. If a channel lessee assumes the noncommercial programming obligations pursuant to a contract with a satellite licensee, the "direct costs" to be considered in applying the 50 percent formula should include the channel lessee's costs in leasing the satellite's transponders and other costs identified by the statute and the Commission. The Commission should afford DBS providers substantial discretion to select noncommercial programming and program suppliers and should permit alternative financial arrangements among the satellite licensees, program suppliers and DBS channel providers, when mutually agreeable, to fulfill the mandate of the statute.

III. DEFINITION OF DBS SERVICE "PROVIDER"

In Part II. of the Notice, the Commission seeks comments on how it should define the statutory term "provider" in fashioning rules under the new Section 335 of the Communications Act of 1934, as amended (hereinafter "Act"), 47 U.S.C. § 335, concerning DBS public service obligations.

The Commission has recognized correctly that the statutory definition in subsection (b), paragraph (5)(A)(ii), of Section 335 is ambiguous with respect to whether a "provider" -- there defined in part as a DBS "distributor who controls" Ku-band channels --

need be "licensed under part 25" of the Commission's rules or only "using" Ku-band channels that are so licensed.[3] If the "provider" must be licensed under Part 25, then entities such as PRIMESTAR, which lease Ku-band transponders from Part 25 licensees, would not fall within the scope of the definition. The Commission also has recognized correctly that this definitional paragraph applies by its terms only to subsection (b) of Section 335, which pertains to educational and informational program carriage obligations of such a "provider" and not to the political programming obligations of subsection (a) (see Notice, ¶ 19).

For the reasons given below, PRIMESTAR believes the better interpretation is that ultimate responsibility rests with the Part 25 satellite licensee to comply with the educational and informational programming obligations of Section 335(b). The licensee should be free to negotiate, however, with any DBS programmer using the licensee's satellite, such as PRIMESTAR, what role the programmer will assume in fulfilling the informational

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[3] Paragraph (5)(A) of subsection (b) states:

"(5) Definitions.--For purposes of this subsection--

(A) The term 'provider of direct broadcast satellite service' means--

(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or

(ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations."

and educational programming obligations. If the programmer assumes the obligations, the Commission should look to that programmer to comply with the noncommercial programming requirements.

Also, as explained below, the Commission should not apply the statutory definition of "provider" in subsection (b) to the different regulatory concerns of subsection (a) of Section 335. Instead, the Commission should use its regulatory discretion under the Act to determine the best practicable way to achieve the Congressional purpose.

[redacted]

Ku-band fixed satellite and selects the programming content on these transponders, it logically should assume the public interest programming obligations of subsection (a). Because of the constitutional sensitivity of program regulation, however, PRIMESTAR urges the Commission to follow traditional statutory construction principles and to adopt rules to implement the public service obligations so as to create the least interference with the other programming on these DBS channels.[5] In Section IV below, PRIMESTAR will discuss the scope of the public service programming rules that should be applied to the DBS programmers.

B. "Provider" As Used In Subsection (b)

Paragraph (5)(A)(ii) of subsection (b)[6] defines the DBS "provider" that must shoulder the ultimate responsibility for implementing the statutory obligations to include educational and informational programming on a minimum of four to seven percent of channel capacity (Section 335(b)(1)). Because the terms "distributor" and "control" in paragraph (5)(A)(ii) are not defined in the statute, and because the syntax of the subparagraph

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5 PRIMESTAR acknowledges the Commission's traditional position that it cannot lawfully challenge the constitutionality of a Congressional statute. The Commission can and should, however, follow the well accepted canon of statutory construction that a statute should be interpreted, if possible, to avoid serious constitutional questions. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). This principle would permit only limited program regulation, especially as applied to non-licensees of frequency spectrum and to users of spectrum that is not "scarce" as understood by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

6 See note 3, above.

(ii) is unclear, the literal meaning of "provider" is ambiguous as to whether it refers to the satellite operator or the DBS programmer (see Notice, ¶¶ 10, 17).

PRIMESTAR disagrees with the assumption of the Commission (Notice, ¶ 11) that a non-licensee programmer, such as PRIMESTAR, is encompassed within the statutory definition of "provider". The statute can just as easily be read to the contrary, as recognized by the Commission (Notice, ¶¶ 10, 17).

It is the direct command of Congress that the Commission impose the educational channel reservation "as a condition of any provision, initial authorization, or authorization renewal" for a DBS provider (Section 335(b)(1) of the Act). It is the satellite-owner licensee, not the lessee programmer, that receives initial and renewal authorizations which the Commission may so condition. There is no suggestion in the statute that Congress intended to extend Title III radio licensing requirements to channel lessees that have no control over electromagnetic spectrum. The owner-licensee of the satellite is the entity over which the Commission has long-term and day-to-day enforcement powers and mechanisms with respect to these rules. (See Notice, ¶¶ 17-18.)

Further, for rate-setting purposes, the owner of the satellite, not the lessee, is in a position to know satellite construction, launch, insurance, telemetry, tracking, control and other "direct costs" which the Commission appears to realize are the largest components of the "total direct costs of making such channel available" to national educational program suppliers (see Notice, ¶ 50). Thus, the satellite owner-licensee has initial

"control" of all video channels transmitted from satellite transponders, and it is in a position to carve out the requisite channel capacity to be reserved for educational program suppliers and to compute rates based on its direct costs.[7]

Of course, to the extent that a satellite lessee programmer, by virtue of its use of transponders for a DBS service, causes a licensee to become obligated for channel set-asides, it would be appropriate for the licensee to negotiate to require the channel lessee to fulfill the educational and informational programming obligations. Thus, the satellite licensee will have the incentive and should be permitted to negotiate with its lessee -- for inclusion of terms in the transponder lease contract -- to provide for the lessee's assumption of duties in this connection. If a programmer lessee assumes some or all of the educational and informational programming requirements, the Commission should look directly to the lessee for satisfaction of the obligations undertaken.

IV. PUBLIC INTEREST REQUIREMENTS

The regulations for public interest programming proposed in Part III. of the Notice appear to be a reasonable interpretation of the Congressional directive in light of the needs of DBS programmers. Specifically, PRIMESTAR urges the Commission (1) not

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7 A fledgling programming service with limited financial resources (see Notice, ¶ 14) may also be much less able financially to carry the burden of the 50-percent of costs that cannot be charged the educational programming suppliers (Section 335(b)(4)(B) of the Act).

[redacted]

with access claims from large numbers of candidates. Thus, unless a DBS provider controls at least 100 channels, the Commission should not consider requiring that candidates for national offices (other than President and Vice President) be given access rights to DBS. Moreover, PRIMESTAR agrees that the reasonable access obligations do not guarantee candidates access to particular program channels or audiences, but only reasonable access to the DBS provider's system as a whole.

The Commission is also correct in suggesting (Notice, ¶ 26) that the equal-opportunities requirement imposed upon DBS by the 1992 Cable Act be interpreted in a manner similar to that previously adopted with respect to cable television. "[T]he Commission has never required cable systems to air opposing candidates advertisements on the same channels or to take into consideration the demographics of channels. Rather, the staff has informally advised CATV systems to ensure that the channels utilized have comparable audience size." (Id.) PRIMESTAR believes that the same approach should be followed with respect to DBS.

The flexibility afforded by the Commission's political programming rules for DBS also should permit DBS providers to channel all political access requests and political advertising onto a single channel if the DBS provider so desires. PRIMESTAR believes such flexibility would permit the DBS service to develop in a manner more responsive to consumers' wishes. Thus, the DBS providers should be free to organize their political programming in a way that they reasonably believe will be most attractive to

viewers while remaining consistent with the basic requirements of Sections 312(a)(7) and 315 of the Communications Act.

In view of the requirements of the 1992 Cable Act, PRIMESTAR cannot fault the Commission's proposed rules for lowest-unit-charge and political file requirements concerning candidate time purchases (Notice, ¶¶ 27-28). At the same time, PRIMSTAR agrees wholeheartedly with the Commission's tentative view (Notice, ¶ 29) that "given the flexible regulatory approach taken for DBS and its early stage of development, no other regulations should be considered at this time." On the subject of local program service (Notice, ¶¶ 31-36), PRIMESTAR agrees that, unless a DBS provider controls a minimum of 100 channels, "other regulations should not be considered in this area given that DBS is a fledgling industry and there is an abundance of local broadcast stations and cable

satellite DBS providers which must control a certain minimum number of channels (to be determined by the Commission) before the definition attaches.[8] Thus, the fixed percentage of the "channel capacity, equal to not less than four percent nor more than seven percent, exclusively for noncommercial programming of an educational or informational nature," cannot be imposed until a DBS provider is deemed to exist, and then can be based on no more than the number of channels actually available to the DBS provider.[9]

PRIMESTAR urges the Commission to fix the percentage uniformly at the minimum four percent, at least with respect to DBS providers that control fewer than 100 channels, because of the developing nature of the DBS industry. Even if, as PRIMESTAR urges, the satellite licensee will have the ultimate responsibility for the educational set-aside under the statute, the DBS programmer will undoubtedly be expected to negotiate with the satellite licensee for the implementation of program carriage requirements. The costs of this carriage obligation should be

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8 Section 25(b)(1) requires that "the provider of such service [direct broadcast satellite service providing video programming] reserve a portion of its channel capacity ...."

9 The Commission also should make allowances for DBS providers that may be required to maintain separate but duplicative networks for a transition period. For example, in the near future, PRIMESTAR will be transmitting its program services in both an analog and a digital format, over separate transponders, as it converts its services from analog to digital. Under these and similar circumstances, the Commission should look to the number of separate program services offered by the DBS provider, not the aggregate number of channels (which may carry duplicative services) for purposes of applying the percentage set-aside requirement.

minimized for the DBS programmers in order to maximize the likelihood of effective DBS competition. The burdensome nature of the statute's 50 percent limit on recovery of direct costs is

PRIMESTAR recommends, in response to the Commission's question (Notice, ¶ 39), that, initially, only a discrete channel or channels -- not a partial channel or channels -- be reserved for noncommercial use on a DBS system, based on any whole number resulting from multiplying by four percent the number of channels usable by the DBS programmer. Thus, for every 25 usable channels, one channel would be dedicated fully to noncommercial educational and informational programming supplied by national educational programming suppliers.

DBS licensees or programmers should not be required to reserve parts of channels based on fractions resulting from the percentage formula. Nevertheless, once the whole channel level is reached (i.e., when the DBS provider has at least 25 channels), the DBS provider should have the flexibility to place the required informational and educational programming on different channels if such placement meets with the reasonable editorial and program scheduling judgment of the provider. So long as the total amount of educational and informational programming carried by the DBS provider (measured perhaps on an annual basis) is equivalent to the programming that would have been carried on the number of channels required by the formula to be set aside, then the DBS

that the capabilities inherent in video compression and other technologies may require further refinement of the set-aside calculation mechanism. For example, in a digitally compressed satellite system, the number of channels in the system devoted to delivering separate video services may change dynamically during any period of time. Some types of programming (e.g., fast action sports) require lower compression ratios than other types of programming (e.g., movies). As the programming on the DBS system changes, so may the compression ratios, so that the number of "channels" of programming on the system may vary from hour-to-hour or day-to-day. In addition, it may become possible and desirable to deliver DBS programming in a mode other than by discrete channels, so that the viewer is selecting from a myriad of video, audio and data program options, none of which is related to a particular channel.

As such capabilities develop and are utilized, the ability to implement the commands of the statute by requiring the reservation of a percentage of "channels" may become difficult or impossible. Thus, PRIMESTAR urges the Commission to grant DBS providers sufficient flexibility to calculate their obligations on other than a "percentage of channels" basis so that the regulatory requirements for "channel" reservations will adapt to technological changes rather than hinder the technology or prevent its deployment for the benefit of consumers.

B. Programming Liability

PRIMESTAR agrees with the Commission's tentative view (Notice, ¶ 41) that a DBS provider should not be liable for harm or violations caused by programming over which it has no editorial control. Such non-liability is called for when the operator of a communications medium has no control of the content of the communication.[11] If the DBS provider is determined to be the satellite licensee, as PRIMESTAR argues it should be, the programmer leasing transponder capacity therefrom should, likewise, not be permitted to exercise editorial control and should consequently not be legally responsible for programming presented by educational suppliers on any channel reserved for that use on the DBS system.

C. Rates For Reserved Channels

Recognizing that "DBS service under both Part 100 and Part 25 is a fledgling industry," the Commission questions whether the 50-percent-of-costs directive of the statute could restrict further development of DBS and whether there are alternative approaches consistent with the statute (Notice, ¶ 49). PRIMESTAR agrees with the Commission's concern about the financial ability of the DBS

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[11] See Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959). With respect to the noncommercial programming for which channel capacity must be reserved under Section 335(b), paragraph (3) of the subsection states in part: "The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection."

industry to subsidize educational programming at the heavy direct expense of the industry.

Therefore, PRIMESTAR urges the Commission to give the broadest interpretation possible to the definition of "total direct costs of making such channel available" (Section 335(b)(4)(B)), in view of the fact that only 50 percent of those costs may be passed on to the noncommercial programming suppliers as part of the "reasonable prices, terms, and conditions, as determined by the Commission ..." (Section 335(b)(3)).

The "total direct costs of making such channel available" would include all the reserved-channel pro-rated costs of constructing, insuring, launching, controlling, tracking and maintaining the satellite and its ground-station links. To the extent that PRIMESTAR and other channel lessees, either by definition of "provider" or through contract with their satellite licensees, were to take on the responsibility of the reserved channel or channels, the per-channel costs passed on to PRIMESTAR and other lessees through their leases of satellite transponders would have to be ascertained and added to additional reserved-channel pro-rated costs incurred by PRIMESTAR and other lessees in coordinating and uplinking their programming to the satellite. In other words, if the channel lessee has the educational and informational programming obligations, it is the channel lessee's costs, not the licensee's costs, which are relevant for the 50 percent calculation. PRIMESTAR recommends that the text of the Commission's rule on rates incorporate the cost elements

identified above and leave room for other legitimate direct costs that might not fit neatly into one of those elements.

D. Definition of Qualified Programming and Programmers

Finally, PRIMESTAR urges the Commission to adopt a flexible approach to the definitions of "national educational programming supplier" and "noncommercial programming of an educational or informational nature." In addition to educational television stations, public telecommunications entities and educational institutions, the Commission should recognize that many other entities, such as nonprofit corporations, foundations, etc. often produce and supply programming that is informational and educational in nature. Moreover, the Commission should include within the scope of qualified programming a broad range of offerings, including news, public affairs, non-entertainment children's programming, medical informational programming, minority oriented informational programming, and, in fact any programming in general that is designed to provide information or to educate. This would include such offerings as Mind Extension University and the newly announced services of PBS.[12]

The Commission also should make it clear that DBS providers may satisfy their obligation with respect to informational and

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12 PRIMESTAR believes that the carriage of audio programming of an educational or informational nature should be counted towards the percentage set-aside. Although certain clauses of subsection (b) of Section 335 refer to "video programming" (i.e., (b)(3) and (b)(4)(C)(ii)), the general percentage set-aside requirement of subsection (b)(1) speaks only to "noncommercial programming of an educational or informational nature."

educational programming by methods other than straight leases of channel capacity to qualified program providers. First, the statute does not grant absolute access rights to any particular program or program supplier. DBS providers should have broad discretion to select from competing programs and program suppliers to fill the channel capacity set-aside in a manner consistent with their overall program objectives. Second, PRIMESTAR encourages the Commission to permit alternative financial arrangements between DBS channel providers and noncommercial programming suppliers, as suggested in the Notice, ¶ 51. If these suppliers and their programming, as defined by the statute, can be accommodated to the mutual satisfaction of the interested parties, then there is no reason why those arrangements should not count toward fulfilling the DBS service provider's obligations under Section 335(b), even though there is not a "lease" of channel capacity at the 50 percent rate.[13]

CONCLUSION

The 1992 Cable Act has placed what could be potentially onerous obligations upon DBS providers. DBS systems are being required to grant access for others' programming and advertising that will be financially costly to those who are risking large investments in DBS systems in a fiercely competitive television

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13 For example, a DBS provider, in order to enhance the attractiveness of its program package, may wish to carry one or more PBS stations at little or no charge to the station. Such an arrangement, which clearly would pass the 50 percent of direct cost test, should count towards the channel set-aside obligation.

marketplace. In these comments, PRIMESTAR has set forth reasonable interpretations of the statute that will fulfill the goals of Congress and minimize the financial impact and intrusiveness upon the programming decisions of DBS programmers. PRIMESTAR urges the Commission to adopt the recommendations set forth herein.

Respectfully submitted,

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